

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

## BERNARD CURTIS DAVIS,

**Plaintiff,**

V.

THOMAS GRABSKI, BRENT JOHNSON,  
IAN FERNANDO, TOMMIE W.  
NICHODEMUS, BRENT VAN DYKE,  
JAMES MAAS, WALTER ROBINSON,  
JASON BRAY, J&J TOWING COMPANY  
HEIMANN (PCSO DEP. #507),

## Defendants.

No. C13-5183 RBL/KLS

## **REPORT AND RECOMMENDATION**

**Noted For: May 24, 2013**

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff's application to proceed *in forma pauperis* (ECF No. 1) is pending. The Court reviewed Plaintiff's proposed civil rights complaint and determined that the complaint seeks relief in habeas. ECF No. 1-1. Therefore, the Court declined to serve the complaint but gave Plaintiff the opportunity to file an amended complaint. In the meantime, the Court held his application to proceed *in forma pauperis* (ECF No. 1) pending Plaintiff's response so that Plaintiff would not incur the \$350.00 filing fee debt.

Plaintiff has not responded to the Court's Order. Because Plaintiff seeks relief primarily in habeas that must first be pursued in state court, his complaint should be dismissed.

## DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or

1 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
2 or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that  
3 fail to state a claim upon which relief may be granted, or that seek monetary relief from a  
4 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
5 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998). A complaint is legally frivolous when it  
6 lacks an arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v.*  
7 *Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984). A complaint or portion thereof, will be  
8 dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual  
9 allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that  
10 all the allegations in the complaint are true.” *See Bell Atlantic, Corp. v. Twombly*, 127 S.Ct.  
11 1955, 1965 (2007) (citations omitted). In other words, failure to present enough facts to state a  
12 claim for relief that is plausible on the face of the complaint will subject that complaint to  
13 dismissal. *Id.* at 1974.

14 To state a claim under 42 U.S.C. § 1983, a complaint must allege: (i) the conduct  
15 complained of was committed by a person acting under color of state law and (ii) the conduct  
16 deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the  
17 United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420 (1981),  
18 *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the  
19 appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
20 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

21 On the basis of these standards, Plaintiff has failed to state a claim upon which relief can  
22 be granted. Plaintiff contends that he was arrested on March 19, 2009 for a “strong-armed  
23 robbery” of an AM/PM gas station after the robbery victim provided a license plate number that

1 was traced to Plaintiff's vehicle. Plaintiff alleges that without reasonable cause or a warrant,  
2 Pierce County Sheriff deputies entered Plaintiff's home, arrested him, and after an unlawful  
3 search, seized evidence (including firearms, ammunition, marijuana, and other drug  
4 paraphernalia) from his residence. *Id.*, pp. 7-8. The deputies also impounded his vehicle. *Id.*, p.  
5 8. Plaintiff claims that the impoundment of his vehicle was an unlawful seizure in violation of  
6 his Fourth Amendment rights. ECF No. 1-1, p. 11.

7  
8 Attached to Plaintiff's complaint are copies of a Notice of Vehicle Impound dated April  
9 10, 2009, Notice of Right of Redemption and Opportunity for Hearing, Acknowledgement of  
10 Person Redeeming Vehicle (signed by Plaintiff's mother), Notice of Custody and Sale of  
11 Abandoned Vehicle, J&J Towing invoice in the amount of \$437.00, and copy of a certified mail  
12 receipt addressed to Mr. Davis. ECF No. 1-1, pp. 44-52.

13 **A. Lack of Probable Cause/Unlawful Search and Seizure**

14  
15 It is not clear from Plaintiff's pleading whether he is currently incarcerated for the crimes  
16 for which he was arrested on March 19, 2009. In his complaint, Plaintiff states that he received  
17 jail time for a "robbery that never occurred." *Id.*, p. 4. To the extent Plaintiff seeks an earlier  
18 release from confinement and/or damages relating to his continued confinement, Plaintiff's  
19 action is not cognizable under 42 U.S.C. § 1983 and the proper course of action to challenge his  
20 incarceration is through a habeas corpus petition, which he must first file in state court. Plaintiff  
21 does not allege that he has done so nor does he allege that his conviction or sentence have been  
22 reversed or otherwise declared invalid.

23  
24 Thus, it appears that Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477,  
25 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). In *Heck*, the United States Supreme Court held that a  
26 civil rights complaint under § 1983 cannot proceed when "a judgment in favor of the plaintiff

1 would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint  
2 must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has  
3 already been invalidated.” *Id.* at 487. “Heck, in other words, says that if a criminal conviction  
4 arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior  
5 for which section 1983 damages are sought, the 1983 action must be dismissed.” *Smithart v.*  
6 *Towery*, 79 F.3d 951, 952 (9th Cir.1996). The § 1983 action “is barred (absent prior  
7 invalidation) - no matter the relief sought (damages or equitable relief), no matter the target of  
8 the prisoner’s suit (state conduct leading to conviction or internal prison proceedings) - if success  
9 in that action would necessarily demonstrate the invalidity of confinement or its duration.”  
10 *Wilkinson v. Dotson*, 544 U.S. 74, 81-82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

12 Thus, to the extent Plaintiff seeks release from his confinement or damages related to his  
13 “jail time,” his actions are not cognizable under 42 U.S.C. § 1983 and must be dismissed. He  
14 alleges that he was charged with and convicted of a robbery. He challenges the validity of the  
15 search and seizure that led to his arrest. However, he makes no allegation or showing that his  
16 confinement has been invalidated or impugned in any respect. Because the successful pursuit of  
17 plaintiff’s challenges would necessarily imply the invalidity of his conviction, his claims are  
18 barred by *Heck*. See, e.g., *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir.2000) (“[A] § 1983  
19 action alleging illegal search and seizure of evidence upon which criminal charges are based  
20 does not accrue until the criminal charges have been dismissed or the conviction has been  
21 overturned.”), overruled in part on other grounds by *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct.  
22 1091, 166 L.Ed.2d 973 (2007); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th  
23 Cir.1998) (false arrest and imprisonment claims barred by *Heck* given that success on those  
24 25  
26

1 claims would require a demonstration of a lack of probable cause for the arrest and a finding of  
 2 no probable cause would necessarily imply invalidity of conviction).

3 **B. Claim for Impound Charges**

4 Plaintiff's claim for the impound charges he had to pay to retrieve his vehicle from J&J  
 5 Auto Repair is not cognizable under Section 1983 because Washington law provides a remedy  
 6 for the return of property for persons aggrieved by an unlawful search and seizure. See, CrR 2  
 7 .3(e):

8 Motion for Return of Property. A person aggrieved by an unlawful search and  
 9 seizure may move the court for the return of the property on the ground that the  
 10 property was illegally seized and that the person is lawfully entitled to possession  
 11 thereof. If the motion is granted the property shall be returned. If a motion for  
 12 return of property is made or comes on for hearing after an indictment or  
 13 information is filed in the court in which the motion is pending, it shall be treated  
 14 as a motion to suppress.

15 Records attached to Plaintiff's complaint reflect that he received notice of his right of  
 16 redemption and was advised of his right to a hearing pursuant to Washington law. *See, e.g.*, ECF  
 17 No. 1-1, p. 45. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393  
 18 (1983); *Parratt v. Taylor*, 451 U.S. 527, 541-44, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1982),  
 19 *overruled in part on other grounds*, *Daniels v. Williams*, 474, U.S. 327 (1986) (unauthorized  
 20 intentional deprivation of property by a state employee does not give rise to a violation of the  
 21 Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available under  
 22 state law). This claim may be dismissed.

23 **C. Claim Against J&J Towing Company**

24 Plaintiff also cannot sue a private actor such as J&J Towing Company in a federal  
 25 Section 1983 case. As noted above, to state a claim under 42 U.S.C. § 1983, a complaint must  
 26 allege: (i) the conduct complained of was committed *by a person acting under color of state law*

1 and (ii) the conduct deprived a person of a right, privilege, or immunity secured by the  
2 Constitution or laws of the United States. *Parratt*, 451 U.S. at 535 (emphasis added). Generally,  
3 private actors are not acting under color of state law. *See Price v. Hawaii*, 939 F.2d 702, 707-08  
4 (9th Cir.1991). In order to determine whether a private actor acts under color of state law for §  
5 1983 purposes, the Court looks to whether the conduct causing the alleged deprivation of federal  
6 rights is fairly attributable to the state. *Id.* (citing *Lugar v. Edmundson Oil Co., Inc.*, 457 U.S.  
7 922, 937 (1982)). Conduct may be fairly attributable to the state where (1) it results from a  
8 governmental policy and (2) the defendant is someone who fairly may be said to be a  
9 governmental actor. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir.1999)  
10 (citing *Lugar*, 457 U.S. at 937). A private actor may be considered a governmental actor  
11 “because he has acted together with or has obtained significant aid from state officials, or  
12 because his conduct is otherwise chargeable to the State.” *Lugar*, 457 U.S. at 937.  
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14 Here, Plaintiff has not alleged facts from which it may be fairly determined that J&J  
15 Towing was acting under color of state law and this claim may be dismissed.  
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## 17 CONCLUSION

18 Plaintiff was ordered to show cause why his claims relating to his conviction and jail time  
19 for robbery should not be dismissed for failure to state a claim. He has filed no response to the  
20 Court’s Order to Show Cause. His complaint should be dismissed and his application to proceed  
21 *informa pauperis* (ECF No. 1) should be **DENIED**.  
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23 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
24 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
25 objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
26 objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the

1 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **May**  
2 **24, 2013**, as noted in the caption.  
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**DATED** this 6th day of May, 2013.

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7 Karen L. Strombom  
8 United States Magistrate Judge  
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